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3 JUAN JOSE DEANDA,
4 Petitioner,
5 v.
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7 AMY MILLER,
8 Respondent.
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10 Case No. [13-cv-02135-BLF](#)
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13 **ORDER GRANTING MOTION TO**
14 **DISMISS PETITION FOR WRIT OF**
15 **HABEAS CORPUS WITH LEAVE TO**
16 **AMEND**

17 [Re: ECF 5]
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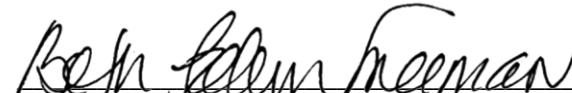
20 On September 18, 2014, Respondent filed a Motion to Dismiss the petition for writ of
21 habeas corpus filed by petitioner Juan Jose Deanda pursuant to 28 U.S.C. § 2254. Resp’t Mot.,
22 ECF 5. Respondent asserts that claim 2 of the petition—alleging ineffective assistance of
23 counsel—was not properly presented to the state court. *Id.* 2-4. Because the petition thus contains
24 both exhausted and unexhausted claims, the petition must be dismissed. *Id.* Petitioner, in his
25 response filed September 29, 2014, does not oppose the Motion to Dismiss, but rather seeks leave
26 to amend his petition in order to excise the unexhausted claim. Pet. Resp., ECF 6. The time for
27 Respondent to file a reply brief has elapsed, and the Court has not received any objection from
28 Respondent regarding Petitioner’s request to amend.

29 A district court may not adjudicate a “mixed habeas petition” that contains both exhausted
30 and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982). However, a petitioner
31 should generally be given the opportunity to amend his petition to delete any unexhausted claims
32 and proceed only on the exhausted ones. *Henderson v. Johnson*, 710 F.3d 872, 873 (9th Cir.
33 2013). As such, and in light of Respondent’s silence on the matter, the Court HEREBY GRANTS
34 Respondent’s Motion to Dismiss with leave to amend. Petitioner shall file an amended petition
35 **within twenty-one (21) days** of the date of this order. Upon the filing of the amended petition,
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1 the parties shall follow the briefing procedure and schedule set forth in Rule 5 of the Rules
2 Governing Section 2254 Cases and Rule 2254-6 of the Habeas Corpus Local Rules.

3 **IT IS SO ORDERED.**

4 Dated: October 16, 2014


5 BETH LABSON FREEMAN
6 United States District Judge

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United States District Court
Northern District of California